

payments (see Exhibits P3, P12, P17, P23 and P33). In these letters, whilst claiming the 1977 receipts as proof that the oral agreements were only in respect of purchase of land, the appellants went on to say that the respondent had undertaken to erect buildings for them on the land, and they even enquired how progress payments were to be made. In our view if the oral agreements were intended to be final contracts and that the appellants were entitled to have their lands transferred to their respective names, it is difficult to fathom what progress payments they were talking about and under which agreement the respondent was obliged to build for them houses on the said land? The progress payments and the respondent's obligation referred to by the appellants could only have arisen from the same oral agreements in 1977 under which the appellants had paid deposits for the whole property.

It is our view that the 1977 oral agreements were in truth and in fact preliminary agreements or booking agreements in which the respondent promised that in consideration of part payment or deposit of \$3,000/- in the case of semi-detached house or \$5,000/- in the case of a shop-house and in consideration of the appellants undertaking to enter subsequently into a sale and purchase agreement, he would ensure the construction of such buildings at the total price of \$35,000/- and \$45,000/- respectively on the building lots provisionally specified in the receipts. The respondent having kept his bargain by getting the Malacca SDC and his own Company, Syarikat Loft, to enter into joint venture agreement in erecting the buildings as promised was therefore not liable to specific performance unless it could be shown the appellants had paid the full purchase price of the property and had executed a sale and purchase agreement.

As regards appellants' request in their evidence for the return of their deposits, we are of the view that the learned trial Judge was correct in law in holding that they were not refundable. Since the appellants were not ready and willing to complete the purchase, they were not entitled to the recovery of their deposits (see *Chow Yoong Hong v. Tai Chet Siang*)⁽⁶⁾. As was stated by Lord Hailsham L.C. in the Privy Council case of *Linggi Plantations Ltd. v. Jagatheesan*⁽⁷⁾:

"But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage."

In the circumstances, we dismiss this appeal with costs.

Appeal dismissed.

Solicitors: A.K.J.D'Cruz & Co.; S.F. Pang & Chandra.

**HAJI HUSSIN BIN HAJI ALI & ORS.
v. DATUK HAJI MOHAMED BIN YAACOB
& ORS.; AND CONNECTED CASES.**

[F.C. (Wan Suleiman, Seah & Hashim Yeop
A. Sani F.J.J.) June 5 & 25, 1983]
[Kota Bahru — Federal Court Civil Appeal Nos.
34, 35 and 36 of 1983]

Practice and Procedure — Suit for declaration — Application to strike out writ — Actions barred by limitation — Discretion of Court — Public Authorities Protection Act, 1948 — R.H.C. 1980, o.18 r.19.

In this case the appellants filed suits against the Menteri Besar, the State Secretary and the Government of Kelantan alleging that their dismissal as penghulus was unconstitutional and unlawful. The respondents did not file a defence but applied for the writ to be struck out on the grounds that it disclosed no reasonable causes of action, was frivolous, vexatious, irregular, null and void and that it was otherwise an abuse of the process of the court. It was averred that the actions were filed too late as they were statute-barred by the Public Authorities Protection Act, 1948. The writs were struck out and the appellant appealed.

Held: (1) where it was clear that the defendants were going to rely on limitation and there was nothing before the court to suggest that the plaintiff could escape from it, the claim would be struck out;

(2) the circumstances in this case would not justify the court exercising its discretion in favour of the appellants where there had been unreasonable vacillation and delay.

Cases referred to:

- (1) *Nagle v. Feilden & Ors.* [1966] 2 Q.B. 633, 648.
- (2) *Drummond-Jackson v. British Medical Association & Ors.* [1970] 1 All E.R. 1094, 1098, 1099, 1101.
- (3) *Riches v. Director of Public Prosecutions* [1973] 2 All E.R. 935, 939
- (4) *Tio Chee Hing & Ors. v. Government of Sabah* [1981] 1 M.L.J. 207
- (5) *Dyson v. Attorney-General* [1911] 1 K.B. 410
- (6) *Guaranty Trust Company of New York v. Hannay & Co.* [1915] 2 K.B. 536
- (7) *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [1921] 2 A.C. 438.

HIGH COURT.

Dato' Wan Mustapha bin Haji Ali for the plaintiffs.

Abdul Hamid bin Haji Mohamed for the defendants.

Mohamed Eusoff Chin J.: The 157 plaintiffs in these three Civil Suits No. 137/1981, No. 2/1982 and No. 4/1982 were penghulus kampong, and the 3 defendants in each of these suits are *Dato' Haji Mohamed bin Yaacob* (1st defendant), the State Secretary (2nd defendant), and the Government of the State of Kelantan (3rd defendant).

The Statement of Claim in each of these Civil Suits, (paragraph 9 in Civil Suit No. 137/81, paragraph 22 in Civil Suit No. 2/1982, and paragraph 42 in Civil Suits No. 4/82 claim that the 1st defendant as "the Head of State of the newly formed State Government" caused the 2nd defendant to unlawfully dismiss the plaintiffs without cause whatsoever, and that the 2nd defendant by letters dated May 2, 1978, dismissed the plaintiffs as penghulus and had refused to employ them from that day. The plaintiffs claim reinstatement and alternatively damages.

The learned State Legal Adviser, Kelantan entered conditional appearance for the three defendants in each of these suits, and then filed in respect of each of these suits a summons in chambers under order 18, rule 19 of the High Court Rules 1980 for each statement of claim to be struck out on the ground that it disclosed no reasonable cause of action and that it is frivolous, vexatious, irregular, null and void and an abuse of the process of court. The affidavit in support of this application filed by the State Legal Adviser also alleges that the action is time-barred under section 2(1) of the Public Authorities Protection Act 1948.

Both parties agree that the three applications be taken together. On December 2, I heard the applications in Chambers and adjourned to open Court for further arguments on January 11, 1983.

The State Legal Adviser, Encik Abdul Hamid bin Hj. Mohamed, submitted that the actions have been filed out of time. He argued that the notices of termination of the services of all the plaintiffs as penghulus kampong were sent out by 2nd defendant on May 2, 1978. The plaintiffs filed:

- i) Civil Suit No.137/1981 on January 24, 1981 3 years 7 months later.

- A ii) Civil Suit No. 2/1982 was filed on January 2, 1982 i.e. 3 years 8 months later, and
- iii) Civil Suit No. 4/1982 was filed on January 6, 1982 i.e. 3 years 8 months later.

B He submitted that the actions of the 1st defendant and 2nd defendant in terminating the services of the plaintiffs as penghulus kampong were done in the execution of their public duties, especially the action of the 2nd defendant, the State Secretary, who was subject to the order of the 1st defendant who was the Menteri Besar of the State. He submitted that the actions were time-barred under section 2(a) of the Public Authorities Protection act, 1948, (Act 198).

C The learned counsel for the plaintiffs, *Dato' Wan Mustapha* submitted that all the plaintiffs had a good cause of action since they were dismissed without being given proper notices of termination, and the only notice which each of the plaintiffs received was notice of termination of his service as penghulu kampong. He submitted that the defendants should not be allowed to make this application to strike out the statements of claim of the plaintiffs since the defendants had not filed their defence. He further submitted that the action of the 2nd defendant (the State Secretary) in dismissing the plaintiffs from their services as penghulus kampong was not an action in the execution of his public duty.

I allowed the application of the learned State Legal Adviser to strike out the plaintiffs' statements of claim in all the three civil suits and dismissed the actions with costs.

G In *Nagle v. Feilden & Ors.*⁽¹⁾ at page 648, paragraph 2, Danckwerts L.J. when dealing with an appeal against the order of Master Clayton and John Stephenson J. who had upheld Master Clayton's order that the plaintiff's statement of claim be struck out and the action dismissed, said, "The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court."

I In *Drummond-Jackson v. British Medical Association & Ors.*⁽²⁾ the first defendant had applied to strike out the statement of claim of the plaintiff under or.18, r.19 (1)(a) as disclosing no reasonable cause of action, but the Master and on appeal, the Judge in Chambers, refused the application.

Lord Denning M.R., at page 1098, paragraph 2 said, "The first question is whether this procedure – an application to strike out – is an appropriate procedure. I think that it is.", and at page 1099, paragraph 2, he said, "The procedure of 'striking out' is ready to hand. We have used it many times lately to decide preliminary issues.". Lord Pearson in the same case, said at page 1101 –

"Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases. The authorities are collected in The Supreme Court Practice 1970 under the heading 'Exercise of Powers under this Rule' in the notes under Ord 18, r 19. One which might be added is *Nagle v. Feilden*. Reference has been made to four recent cases: *Rondel v. Worsley*, *Wiseman v. Borneman*, *Roy v. Prior* and *Schmidt v. Secretary of State for Home Affairs*. In each of these cases there was an important question of principle involved, and the hearing of the application under RSC Ord. 18, r 19, was much longer and more elaborate than is usual, but the final decision was that the alleged cause of action was clearly unsustainable, and so the statement of claim disclosed no reasonable cause of action and was ordered to be struck out. There was no departure from the principle that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed, but the procedural method was unusual in that there was a relatively long and elaborate instead of a short and summary hearing. It must be within the discretion of the courts to adopt this unusual procedural method in special cases where it is seen to be advantageous. But I do not think that there has been or should be any general change in the practice with regard to applications under the rule.

In my opinion the traditional and hitherto accepted view – that the power should only be used in plain and obvious cases – is correct according to evident intention of the rule for several reasons. First, there is in r. 19(1)(a) the expression 'reasonable cause of action', to which Sir Nathaniel Lindley MR called attention in *Hubbuck & Sons Ltd. v. Wilkinson, Heywood and Clark Ltd.* No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by r. 19(2)) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In *Nagle v. Feilden* Danckwerts L.J. said:

"The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court".

I therefore decided that the summons in chambers taken out by the learned State Legal Adviser under Ord. 18, r. 19 R.H.C. 1980 was quite proper in this case.

The next issue is whether the three suits filed by the plaintiffs are time-barred under section 2(a) of the Public Authorities Protection Act, 1948 (Act 198) which states:

"2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect –

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;"

The learned counsel for the plaintiffs alleged that the 1st defendant when instructing the 2nd defendant to terminate the plaintiffs' services and the 2nd defendant when carrying out that instruction, did so not in execution of any public duty, whereas the learned State Legal Adviser had submitted that they did.

To determine this issue it is necessary to examine the statements of claim by the plaintiffs and the affidavit of the learned State Legal Adviser dated January 23, 1982 filed with the summons in Chambers, and the affidavit in reply dated December, 1 1982 filed by the learned counsel for the plaintiffs. As I have stated earlier, the plaintiffs in their statement of claim had alleged that the 1st defendant had in April 1978, in his capacity as Head of State of the newly formed State Government caused the 2nd defendant to unlawfully dismiss the plaintiffs forthwith, and that the 2nd defendant the State Secretary, as agent or servant of the 3rd defendant (the State Government) had by letters dated May 2, 1978 dismissed the plaintiffs or determined their services as penghulus. On this issue, paragraphs 6 and 7 of the affidavit of the learned State Legal Adviser dated January 23, 1982 state:

"6. The regulations governing the appointment of Penghulus Kampong at the material time were provided under Skim Perkhidmatan Penghulu-Penghulu Kampong Kelantan which was issued under the cover of Pekeliling Perkhidmatan Bil. 3 tahun 1968 dated the 1st of May 1968 a copy of which is annexed herewith and marked as Exhibit "WM I".

7. I aver that the Defendants' action in relieving the Plaintiffs of their appointments as Penghulus Kampong on the

2nd of May 1978 were acts done in the execution of a public duty and in accordance with the authority provided by the relevant regulations and in the circumstances by virtue of section 2(a) of the Public Authorities Protection Act 1948, the Plaintiffs' action against the Defendants is statute barred."

Paragraph 6 of the Skim Perkhidmatan Penghulu-Penghulu Kampong Kelantan states:

"6. Calun yang berjaya akan dilantik oleh Menteri Besar dan ia akan diberi satu surat kuasa mengikut contoh di Hujungan A."

The affidavit in reply dated December 1, 1982 of the learned counsel for the plaintiffs does not touch specifically on this issue. I examine these affidavits purely to determine whether or not the 1st and 2nd defendants in determining the services of, or dismissing the plaintiffs as penghulus did so "in pursuance or execution or intended execution ... of any public duty or authority". Whether what the 1st and 2nd defendants did was right or wrong is not an issue for me to determine in this application. I am of the view that the 1st and 2nd defendants did so in pursuance or execution or intended execution of their public duty or authority, and therefore the learned State Legal Adviser is entitled to raise this limitation in this application.

Russell L.J. in *Riches v. Director of Public Prosecutions*,⁽³⁾ said:

"In the light of those more recent authorities, I think, as I say, that perhaps the observations of this court in *Dismore v Hilton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail."

In the instant three actions, it is clear that the actions had been filed after the 3 year limitation period. I therefore allowed the applications of the defendants, and dismissed the actions with costs.

From the above Judgment, the plaintiffs appealed to the Federal Court.

FEDERAL COURT.

Dato' Wan Mustapha bin Haji Ali for the appellants.

A *Abdul Hamid bin Haji Mohamed* (Legal Adviser Kelantan) for the respondents.

Cur. Adv. Vult.

B *Wan Suleiman F.J.* (delivering the Judgment of the Court): Civil Appeal Nos. 34, 35 and 36 of 1983 concern 3 suits by a total of 157 persons who claimed to be Penghulus Kampong who had filed the suits against the 3 respondents who were the Menteri Besar, the State Secretary and the Government of the State of Kelantan respectively.

C The plaintiffs in the 3 suits alleged that their dismissal by the first defendant/respondent had been unconstitutional and unlawful, that there had been breach of the relevant constitutional provision of the Kelantan State Constitution as well as Article 8 of the Federal Constitution, and in their prayer they sought:

- D 1) a declaration that the State Government unconstitutionally acted in dismissing the plaintiffs as Penghulus;
- E 2) a declaration that such dismissal was contrary to Clause LX (first part) of the constitution;
- 3) an order that the plaintiffs be reinstated as Penghulus alternatively;
- F 4) an enquiry into damages in respect of annual allowances, travelling allowances, gratuity and/or pensions due to the plaintiffs. They also sought further or other reliefs.

G The defendants/respondents did not file a defence but an application was made under Order 18 rule 19 of the Rules of the High Court, 1980 for the writ to be struck out on the grounds that

- (a) it discloses no reasonable cause of action;
- (b) it is frivolous, vexatious, irregular, null and void, and
- H (c) it is otherwise an abuse of the process of court.

I In the affidavit in support of the Summons-in-Chambers the Legal Adviser, Kelantan, counsel for the defendants/respondents, averred that since the acts in dismissing these Penghulus Kampong were done in the execution of their public duties in accordance with the authority provided by the relevant regulations and since all the plaintiffs had filed their respective actions too late they were statute-barred by section 2(a) of the Public Authorities Protection Act 1948.

Dato' Wan Mustapha for the appellants now A says that limitation has to be pleaded.

We need not go further than to refer to the judgment of this Court in *Tio Chee Hing & Ors. v. Government of Sabah*⁽⁴⁾ where this court referred to the Court of Appeal decision in *Riches v. Director of Public Prosecutions*⁽³⁾ which decided that where it is clear that the defendant was going to rely on the statute of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it, the claim would be struck out. An extract from the judgment of Davis L.J. at page 939 is relevant:

"In the light of those more recent authorities I think, as I say, that perhaps the observations of this court in *Dismore v. Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the Statement of Claim discloses no cause of action, the limitation objection should or would prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail."

That indeed was the answer of the learned Legal Adviser. We agree with him.

The only other ground taken by the appellants was that where a declaratory judgment is sought the court may make a declaration irrespective of whether or not a consequential relief could be obtained.

Learned counsel for the appellants relied on *Dyson v. Attorney-General*⁽⁵⁾. In that case, certain notices, commonly known as Form 4, were issued by the Commissioners of Inland Revenue under the Finance (1909-1910) Act, 1910. The plaintiff was served with such a form, requiring him to make certain returns and deliver them to an appointed officer within thirty days, under a penalty not exceeding £50. Compliance with this requirement would have involved him in expenses and inconvenience. The plaintiff, thereupon, alleging that the notices were unauthorised and illegal, sued the Attorney-General for a declaration to this effect. This course was strenuously objected to by the defendant, who did not fail to stress the then unusual features of the case. It should be observed, in the first place, that no right of the plaintiff was, or was threatened to be, infringed, that the declaration was not asked for to ascertain any of his rights, but merely to establish

in a negative way that he was under no obligation to comply with the notice; and that he had no cause of action in the conventional sense. The Court of Appeal, however, unanimously rejected all the arguments raised and made the declaration asked for.

A few years later in *Guaranty Trust Company of New York v. Hannay & Company*⁽⁶⁾ some important questions as to the scope of the declaratory judgment was further expounded. Here the plaintiffs asked for a declaration that they were not bound to refund sums paid to them by the defendants in respect of forged bills of lading, and an injunction to restrain the defendants from proceeding with an action instituted in the U.S.A. for such refund.

The first question raised was whether this claim for a declaration came within Order 25 rule 5. The plaintiffs, it is to be observed, were in a similar position to that of the plaintiff in the *Dyson Case*; they only asked for a declaration that they were under no obligation to the defendants. In other words, they had no cause of action in the traditional sense, that is, a cause of action upon which executory relief could be granted. The court, however, surveying the decisions on this point, decided by a majority that it had jurisdiction to grant a declaration in these circumstances.

Pickford L.J. said, "I think ... that the effect of the rule (i.e. Order 25, rule 5) is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declarations"

Another point made by Bankes L.J. should be noted. Though a cause of action is not necessary, he said, still "It is essential ... that a person who seeks to take advantage of the rule must be claiming relief", and "The claim for a declaration is not in itself a claim for relief". Further he made it clear that the word "relief" must be given its fullest meaning. Zamir is of the view that probably all that Bankes L.J. meant was that a declaration could not be claimed for the mere sake of satisfying the curiosity of the plaintiff as to his rights, but should be claimed to relieve the plaintiff from a real difficulty, or, in other words, for some useful purpose.

In the latter connection see also the House of Lords decision in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*⁽⁷⁾

However, we note from the affidavits of the State Legal Adviser, Kelantan filed in support of his application in all the three actions which are now the subject of appeal that 154 out of the 157 plaintiffs/appellants had filed actions earlier in Kota Bahru Civil Suit Nos. 86/1978 and 94/1978 against the third respondent, the Government of the State of Kelantan.

That respondent had *inter alia* pleaded in defence that the plaintiffs had not been appointed Penghulus within the definition of the Interpretation Act, 1967 or as members of any of the public services or holders of any office of profit within the meaning of the Federal Constitution and since their appointments as Penghulus Kampong were honorary and at the pleasure of the third respondent they had no right, lien or title to such appointments.

On February 28, 1979 the appellants filed a notice discontinuing wholly their actions against the respondent.

We are inclined to agree with the learned Legal Adviser that in filing C.S. No. 137/81, C.C. No. 2/82 and C.S. No. 4/82 well out of time the plaintiffs/appellants had been guilty of unreasonable delay.

We note that these subsequent suits were filed approximately 43 months, 46 months and 45 months respectively after the letter terminating the appellants' services were sent to them, and therefore well after the three year limit prescribed by s.2(a) of the Public Authorities Protection Act, 1948.

No explanation was given by learned counsel for the appellants for this strange course of events in his affidavits in reply or at the hearing of the appeals.

Now the granting of a declaratory judgment is a matter purely at the discretion of the court. We do not think that the circumstances surrounding the present appeals would justify our exercising this discretion in favour of the appellants where there has been, in our view, unreasonable vacillation and delay. We set down hereunder a passage from page 191 of *The Declaratory Judgment* by Zamir:—

"This discretion is employed, as discretion was originally employed in respect of all equitable remedies, primarily to do justice in the particular case before the court. It is

A wide enough to allow the court to take into account virtually all objections and defences possible in equitable proceedings. Thus, for instance, in one declaratory action the court took into consideration the motives of the plaintiff in bringing the action (*Everett v. Griffiths* [1924] 1 K.B. 941, 960-61. In another action (*Hogg v. Scott* [1947] 1 K.B. 759, 767) the court held that the plaintiff had waived his right to take the proceedings and, further assumed that the claim might also be dismissed on the ground of undue delay ("laches") (Limitation Act 1939).

Accordingly we dismissed this appeal with costs.

C *Appeal dismissed.*

Solicitors: Wan Mustapha & Co.

D **DATO MOKHTAR BIN HASHIM & ANOR.
v. PUBLIC PROSECUTOR**

[F.C. (Raja Azlan Shah L.P., Abdul Hamid & Abdoolcader F.JJ.) June 9, 10, 13 to 17, 20 to 23 & July 23, 1983]

E [Kuala Lumpur — Federal Court Criminal Appeal
Nos. 10 & 11 of 1983]

F *Criminal Law & Procedure — Murder — Trial — Security case — Whether Attorney General's certificate could be challenged — Statement by accused to be admissible must be voluntary — Admissibility of lock-up register and station diaries — Statement recorded after prolonged period of interrogation at extremely odd hours ranging into the early hours of the morning in breach of Lock-up Rules — Statement not voluntary and should not have been admitted — Circumstantial evidence — Question of fact based on credibility of witness — Functions of Appellate Court limited in character and scope — No reason to interfere with assessment of trial judge — Impeachment of credit of witness — Effect of — Refusal to allow cross-examination an error — No substantial miscarriage of justice — Expert witness — Acceptance by trial judge — Ownership, possession, custody and control of pistol from which shots fired — Prima facie case against first appellant — Defence of alibi — Assessment by trial judge — Question of fact — Remarks on vituperative language used in petition of appeal and contumelious suggestions in address by counsel — Lock-up Rules, r. 20 — Essential (Security Cases) Regulations, 1975 Reg. 2(2) & 21 — Evidence Act, 1950, ss. 35, 145 & 155(c) — Criminal Procedure Code (F.M.S. Cap. 6), s. 112.*

I *Evidence — Statement by accused person — Admissibility — Impeachment of credit of witness — Evidence Act, 1950, ss. 35, 145 & 155(c).*

This was an appeal against the conviction of the appellants on a charge of murder. It was alleged at the trial that the two appellants together with two other persons, in furtherance of their common intention did commit murder by causing the death of one Dato Mohamad Taha